

sentence to one of life imprisonment. The sentence of three years' imprisonment by the lower court is set aside. The mandatory six strokes of the whipping are affirmed.

Finally, I would make an observation. Some time ago, arising out of an appeal involving abetment of robbery with the use of firearms (Sibu Criminal Appeal No 11 of 1985), I had occasion to come across a connected case also involving robbery with the use of firearms (Sibu Sessions Court Criminal Case No SC/14/84). Though the facts and circumstances in the latter case abovementioned appears no less serious than those in the instant case, the accused was charged under a different law attracting lesser punishment. I wish to make it absolutely clear that in so commenting I am not in any way levelling criticism on anyone. Indeed, there might well be adequate reasons justifying different treatment of the two cases. I mention this in order that the matter would be given such due consideration as it might perhaps deserve should there come a time when the executive power of clemency is pleaded in aid. Of course, valid reasons, if any, (of which I have no knowledge) for treating the two cases differently cannot be ignored.

Appeal dismissed.

Reported by Ng Sheau Jiuan

Re Low See Kim

HIGH COURT (KUANTAN) – ORIGINATING MOTION NO 32-17-87
LAMIN J
12 FEBRUARY 1988

Administrative Law – Leave to apply for certiorari and mandamus – Application for – Rejection of application for retail licence and public house licence by Lembaga Pelesenan dan Exsais – Whether statutory remedies must first be exhausted – Discretion of court in granting judicial review – Excise Act 1976, s 35(7)

On 28 October 1987, the applicant submitted an application for a retail licence and public house licence. On 28 November 1987, the Pengerusi Lembaga Pelesenan dan Exsais wrote to inform him that his application had been rejected. The letter also informed him that if he was not satisfied with the decision of the Lembaga, he may, within 30 days, appeal to the minister as provided under s 35(7) of the Excise Act 1976. The applicant did nothing and only after 24 days had passed (ie on 22 December 1987), he filed a notice of originating motion asking the court for leave to apply for orders of certiorari and mandamus against the Lembaga's decision.

Held, dismissing the application: (1) The remedy by way of judicial review is still a matter of discretion for the High Court but it will be available in only exceptional circumstances.

A (2) In the present case, in view of s 35(7) of the Excise Act 1976, the applicant must first exhaust the remedies under the statute.

(3) The applicant has not proved mala fides on the part of the Lembaga when rejecting the present applicant for those licences.

B (4) The facts relating to the present application do not constitute such an exceptional circumstance as to justify a grant of the remedy prayed for.

[*Editorial Note*: The applicant appealed to the Supreme Court vide Supreme Court Civil Appeal No 53 of 1988. The appeal was heard on 18 April 1988 and dismissed with costs.]

C **Case referred to**
1 *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 (folld)

Legislation referred to
Excise Act 1976 s 35(1), (7)

D *S Sivasubramanian (Wong Fook Leong with him)* for the applicant.
Vong Soh Fah (Federal Counsel) for the respondent.

Cur Adv Vult

Lamin J: In this case, the applicant submitted his application for the retail licence and public house licence on 28 October 1987, for the period 1 January 1988 to 30 June 1988, to the Pengerusi Lembaga Pelesenan dan Exsais for the District of Pekan, Pahang. On 23 November 1987, he wrote to the Pengerusi Lembaga Pelesenan dan Exsais, appealing to them to issue the licences applied for, giving his reasons in support. On 28 November 1987, he received a letter from the District Officer, Pekan informing him that his application had been rejected at a meeting of the Lembaga Pelesenan dan Exsais sitting on 26 November 1987. The said letter also indicated that if he was not satisfied with the decision of the Lembaga, he may appeal to the minister as provided under s 35(7) of the Excise Act 1976.

Sub-section (7) of s 35 reads:

Any person aggrieved by the decision of the licensing board may within 30 days of being notified of the decision appeal therefrom to the minister whose decision shall be final.

H In the case of *Government of Malaysia & Anor v Jagdis Singh*,¹ Tan Sri Hashim Yeop A Sani SCJ, delivering the judgment of the Supreme Court, dealt with the question as to whether domestic remedies must first be exhausted if such remedies were available. The learned judge examined a series of authorities and at p 189 he said:

A clear principle is reiterated here, ie it is not a rigid rule that whenever there is appeal procedure available to the applicant, he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

In re Preston [1985] 2 All ER 327 was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists, except in very exceptional cases.

From the authorities cited, the position seems to be quite clear in that the remedy by way of judicial review is still a matter of discretion of the High Court, but it will be available in only exceptional circumstances. In the *Jagdis Singh* case,¹ the respondent had received notices of additional assessment for income tax for the years 1979 to 1984 inclusive. The respondent wrote to the Department of Inland Revenue, Ipoh informing them of the respondent's desire to appeal against the additional assessments. However, the respondent filed a notice of motion for an order of certiorari to quash the said notices of additional assessment. The grounds relied on by the respondent were that the notices of assessment were based on conjecture and have been issued maliciously and as a vindictive act. The High Court decided in his favour by granting the application. The Supreme Court reversed the decision on appeal and on the facts the Supreme Court found that as the Inland Revenue Department was unable to make a proper assessment of the respondent's tax because of the failure of the respondent to comply with the various notices issued to him, the department was entitled to compute the tax under s 91(1) of the Income Tax Act according to the best of the Director-General's judgment. The court said that the onus of proving to the Special Commissioners on appeal that the additional assessments were excessive or erroneous lay on the respondent. The true amount should be determined on appeal. The Supreme Court reversed the decision of the High Court in that certiorari was not to issue. This meant that in the circumstances of the case, domestic remedies must first be exhausted.

In the present case before me, in view of s 35(7) the question to my mind is whether this is a fit and proper case for me to exercise my discretion according to the principle as reiterated by the Supreme Court in the *Jagdis Singh* case.¹ In this case, on 28 October 1987, the applicant submitted his application for the retail licence and public house licence for the period 1 January 1988 till 30 June 1988, ie the first half of 1988. On 23 November 1987, the applicant wrote to the Pengerusi Lembaga Pelesenan dan Eksais for the District of Pekan (see exhibit 'J' to the affidavit of the applicant as per enclosure (3)) appealing for his application to be approved. Three days later, ie on 26 November 1987, the Lembaga sat and rejected the application and on 28 November 1987 the applicant came to know of the decision by a letter from the Lembaga which also informed him that if he was not satisfied with the decision, he could appeal as provided for under s 35(7) of the Excise Act. By virtue of sub-s (7),

A he had 30 days, ie from the day he was notified of the decision, within which to lodge his appeal to the minister. The applicant applied for those two licences to commence on 1 January 1988 and from the day he came to know of the decision to the proposed date of commencement of those licences, he had more than 30 days. The applicant did nothing and only after 24 days had passed, ie on 22 December 1987, he came to this court instead to file a notice of originating motion to ask this court for leave to apply for an order of certiorari and mandamus. No explanation was offered as to why the applicant did not take any action earlier either to appeal to the minister or come to this court. If he had appealed to the minister upon intimation of the rejection letter, the fate of his appeal could possibly have been known before the end of December 1987. However, his inaction for 24 days in the absence of any explanation does seem to suggest that the very nature of his case did not demand his urgent attention.

To grant or not to grant the licences was a matter well within the jurisdiction of the Lembaga to decide (s 35(1) of the Excise Act). The applicant by his letter of 23 November 1987 forwarded his grounds in support of his application (though there is no such requirement under the law) and hoped that they would be considered favourably. The Lembaga sat in Pekan, the same town where the applicant resided, and it can safely be assumed that the Lembaga must have sight of the letter when it sat to consider his application. I say so because the rejection letter from the Lembaga was received by the applicant within two days whilst his letter of 23 November had an extra clear day for it to reach the Lembaga. In view of the time available, it can be assumed that his plea had been considered. In the circumstances, the proper thing for him to do was to immediately appeal to the minister. As I am of the view that in this case the applicant must first exhaust the remedies under the statute, I do not think I need deal with other issues except perhaps the allegation of mala fides.

The applicant alleged that the decision of the Lembaga was mala fides on the ground that the Lembaga was influenced by the objection of the Majlis Ugama Islam dan Adat Resam Melayu Pahang in the earlier applications for a licence in respect of the second half of 1987. Those applications were finally approved after the filing of originating motion no 32-14-87, ie after 23 October 1987, notwithstanding the objection from the Majlis. (I am quite aware of the approval in writing by a letter dated 10 July 1987 but received on 23 October 1987.) In the circumstances, I find it difficult to accept the inference that the Lembaga had been influenced by the Majlis' earlier objection in deciding the present application. In the earlier applications, since they were approved, the objection from the Majlis then must be assumed to have counted for naught. How can it now be said that that

same objection must have anything to do with the present application. Therefore, I am of the view that the applicant has not proved mala fides on the part of the Lembaga when rejecting the present application for those licences in respect of the first half of 1988. In conclusion, I hold that the facts relating to the present application do not constitute such an exceptional circumstance in order that I may properly exercise my discretion to grant the remedy prayed for.

Application is dismissed with costs.

Application dismissed.

Solicitors: *Siva Ram & Associates.*

Reported by *Ng Sheau Jiuan*

Patrick Rao v Subramaniam & Ors

HIGH COURT (KUALA LUMPUR) CIVIL SUIT NO F623 OF 1984

SITI NORMA YAAKOB J
12 FEBRUARY 1988

Land Law – Purchase of land – Purchase by trustees – Trust in favour of actual purchasers not executed – Injunction to restrain trustees from dealing with land – Setting aside.

The first to the fourth defendants purchased certain lands as trustees of an association for and on behalf of the plaintiff and 99 others. The plaintiff and the 99 others contributed certain sums of money for the purchase. The intention of all the people was that the land should be converted into a housing estate for the plaintiff and the others. However, the defendants did not execute a trust in favour of the plaintiff and the other purchasers as promised. The defendants found a third party to whom they wanted to sell the land. To protect his interest, the plaintiff obtained an ex parte injunction restraining the defendants from dealing with the land. The defendants applied to set aside the injunction.

Held: As the defendants' contentions had no merits, the application to set aside the injunction was dismissed.

Legislation referred to
National Land Code 1965 s 205(3)

G Vadiveloo for the applicants.
G Vargheese for the respondents.

Cur Adv Vult

Siti Norma Yaakob J: In this suit, the plaintiff claims that principally as a beneficiary of a resulting trust, he is entitled to be declared so, as well as entitled to his respective share of a piece of land over which the defendants hold as trustees.

A It is not disputed that the land in dispute is agricultural land and was purchased on 25 April 1975 to better the lot of the Indian community. To that end, there was every intention of developing it into a housing estate, for which conversion and subdivision would become necessary, and individual titles ultimately issued to the purchasers who are the plaintiff and 99 other persons. They each contributed sums varying from \$3,000–\$3,500 for their respective shares and these were paid to the first to fourth defendants who were and are still office-bearers of the fifth defendant. However, the sale and purchase agreement was executed by the first to fourth defendants as purchasers in their capacity as trustees of the fifth defendant and receipts of the sums collected from the 100 purchasers were issued by the fifth defendant.

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D In a letter dated 12 June 1980, the present solicitors for the first to fourth defendants indicated to the plaintiff that the first to fourth defendants would, upon registration of the memorandum of transfer, execute a trust in favour of all the 100 purchasers and that the plaintiff's entitlement to the land will be 1/104 share. From this letter, it is very clear that first to fourth defendants, who did not contribute anything to the purchase price in the first place, had also included themselves as beneficiaries under the proposed trust to be created. The contents of this letter, however, run contrary to the sale and purchase agreement as well as the declaration made by the first to fourth defendants in their letter dated 16 November 1979, wherein they had declared that the land had been purchased by members of two branches of the fifth defendant and that they, the first to fourth defendants, hold the land as trustees for the fifth defendant.

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G More than 12 years after its purchase, the land has still not been converted or subdivided into housing lots as its location next to Subang Airport made it not feasible for such conversion and subdivision and as for the issue of separate titles to the plaintiff and the other 99 purchasers, this has now become impossible by virtue of s 205(3) of the National Land Code that forbids the issue of separate titles to agricultural land less than one acre in size. For these reasons, the defendants have negotiated and found a third party who is willing to purchase the property from them. To protect his interest, the plaintiff had on 27 May 1985 obtained an injunction, ex parte, to restrain the defendants, their servants or agents from dealing with the land in whatsoever manner.

H
I A year and ten months after the injunction had been obtained, the defendants applied, inter alia, to have it set aside on the following grounds:

- (1) Delay in the service of the injunction.
- (2) Duplicity of actions as the plaintiff had already filed an earlier suit seeking the same remedies.
- (3) Circumstances have changed to warrant the dissolution of the injunction.